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No. 01-1375

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

NAVAJO NATION,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF *AMICI CURIAE* OF THE JICARILLA APACHE NATION AND THE PUEBLO OF LAGUNA IN SUPPORT OF RESPONDENT THE NAVAJO NATION

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BRIEF *AMICI CURIAE* OF THE JICARILLA APACHE NATION AND THE PUEBLO OF LAGUNA IN SUPPORT OF RESPONDENT THE NAVAJO NATION

The Jicarilla Apache Nation ("Jicarilla") and the Pueblo of Laguna ("Laguna") respectfully submit this brief as *amici curiae* in support of the Navajo Nation. Both parties to this case have consented to the filing of this brief, as indicated in letters filed with the Court.[1]

INTEREST OF *AMICI*

The Jicarilla Apache Reservation is located in northwest New Mexico on the eastern edge of the San Juan Basin, which is the second largest gas field in the lower 48 states. Jicarilla is the lessor and royalty owner of over 100 oil and gas mining leases issued in the early 1950s under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§396a-396g ("IMLA"). Jicarilla depends on royalties from its oil and gas leases to fund its operating budget, which is used to provide essential government services to its members and other residents: revenues (including taxes) from oil and gas production comprise about 90% of the tribe's operating budget, and are used for the police department, the tribal court, emergency services, and various community social services, including day care and care of the elderly, to list a few.

The Pueblo of Laguna, which comprises more than 500,000 acres of trust lands in west central New Mexico, is located in the Grants Mineral Belt, one of the world's largest uranium fields. Between 1953 and early

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no person other than *amici* made a monetary contribution to the preparation or submission of this brief.

1982, the Anaconda Company removed over 24 million tons of uranium ore from the Jackpile mine on the reservation, pursuant to leases approved by the Government under the IMLA. The Jackpile mine, a pit several hundred feet deep and covering several square miles, was the largest open pit uranium mine in the world when it was operating. The U.S. Atomic Energy Commission was the major purchaser of the uranium.[2]

As discussed below, the Department of the Interior ("Department") was and is responsible for approving these leases and administering them in virtually every aspect, including ensuring that the correct amount of royalties is paid to the tribes for their minerals. The Government's proper management of and accounting for the tribes' resources is of the utmost importance to the tribes and to their efforts to provide services and economic opportunity to their members. *Amici* therefore have a vital interest in ensuring that the Government carries out its trust responsibilities under the IMLA and other mineral leasing laws.

SUMMARY OF ARGUMENT

Under the IMLA and associated statutes and regulations, the Secretary of the Interior ("Secretary") has approval authority over Indian mineral leases and is required to manage virtually every aspect of Indian mineral leasing activities, from production to processing to collection of royalties. In 1984, the Department, in the course of exercising these duties, adjusted the royalty rate in a Navajo coal lease from an extremely low rate

[2] In addition to uranium, Laguna has timber, sand and gravel, and other natural resources on its reservation, some of which are also subject to the IMLA.

(which the Navajo Nation had been receiving for 20 years) to one reflecting the market rate. The lessee, Peabody Coal Company, appealed the decision, and the Department was on the verge of upholding the decision on appeal. At this point, however, the Department abruptly stopped honoring its obligations. The Secretary met secretly with a close friend whom Peabody had hired to lobby against the pending decision. The Secretary subsequently instructed the Department not to issue the appeal decision, at the same time misleading the Navajo Nation as to the reason for the delay in the appeal. Ultimately, the Navajo Nation was forced to settle for a substantially lower royalty rate. The Secretary approved the renegotiated lease despite the unsupportable rate.

The Government contends that these breaches of its obligations are not compensable, but its position is contrary to this Court's decision in *United States v. Mitchell*, 463 U.S. 206, 213 (1983) ("*Mitchell II*"). The Indian Tucker Act, 28 U.S.C. §1505, provides the necessary waiver of sovereign immunity. In addition, the Secretary's control, supervision and management of Indian mineral leasing under the IMLA and associated statutes and regulations are sufficiently extensive to establish and define the "contours" of the Government's trust responsibilities. 463 U.S. at 224. Under *Mitchell II's* requirements, the Government is liable for the breach of duties falling within those contours.

In carrying out these duties, moreover, the Government was required to maximize the Navajo Nation's revenues from its coal. This requirement stems directly from the IMLA, and it is underscored by the Government's obligations as a trustee, which reinforce the Government's duties under the IMLA to act in the best interests of the tribal beneficiary. In this case, the Government acted in the best interests of the lessee, rather than

of the tribe. A more blatant violation of tribal interests, and of trust, is difficult to imagine.

The Government's utter disregard for its statutory, regulatory, and related trust obligations to the Navajo Nation should not be allowed to go unredressed. Congress recognized that providing Indian tribes access to the courts to enforce their claims against the Government was a matter of national honor, and enacted the Indian Tucker Act, a part of the Indian Claims Commission Act, 25 U.S.C. §§70-70w (repealed), to provide that access. Since then, Congress has repeatedly accepted liability for breaches of the Indian trust responsibility, both in congressional reference cases and in statutes. Congress could have limited its trust responsibilities under the Indian mineral leasing laws, as it has done in some other statutes, but it did not do so. Instead, Congress carefully balanced its trust responsibilities with the goal of fostering tribal self-determination, and in the area of Indian mineral leasing – which requires extensive oversight but brings in much-needed tribal revenues – decided that Government supervision is the paramount concern.

ARGUMENT

I.
THE INDIAN MINERAL LEASING ACT AND ASSOCIATED STATUTES AND REGULATIONS ESTABLISH FIDUCIARY OBLIGATIONS ON THE PART OF THE GOVERNMENT AND MANDATE COMPENSATION FOR THEIR BREACH.

The Government clearly failed to meet its trust obligations under the statutes and regulations relevant to this case: the Court of Federal Claims found that the Government "[met] secretly with parties having interests adverse to those of the trust beneficiary, adopt[ed] the third parties' desired course of action in lieu of action

favorable to the beneficiary, and then misle[ ]d the beneficiary concerning these events," 46 Fed. Cl. at 226, and by doing so "violated the most basic common law fiduciary duties owed to the Navajo Nation," *id.* at 219. The Federal Circuit held that these breaches also were violations of the Government's statutory fiduciary duties, specifically, the statute's "charge to the Secretary to obtain for the Indians the maximum return for their minerals." 263 F.3d at 1332. The Government nevertheless asserts in its brief that, although it "fully accepts the implications of the [trust] relationship and the undertakings that go with it," Pet. Br. at 47, the Government is not required to compensate the Navajo Nation for breach of that trust.

According to the Government, the Navajo Nation must demonstrate that the Government violated a *specific* statutory or regulatory provision "that would clearly mandate the payment of damages," Pet. Br. at 16, both to demonstrate a waiver of sovereign immunity and to make the breach of trust compensable. The Government apparently would concede jurisdiction and liability only in the face of statutory language providing that "the Secretary, in approving or disapproving a tribal coal lease, shall not conspire with lessees against the tribal lessor nor subvert the best interests of the tribe in making a decision regarding its trust resources, and shall be liable in money damages for any breach of that trust and this provision." Pursuant to the holding of this Court in *Mitchell II*, the Government is wrong on both counts.

A. The United States Waived its Sovereign Immunity in the Tucker Acts.

Congress waived the Government's sovereign immunity long ago for claims for money damages based on the Constitution or federal statutes or regulations, when it passed

the Tucker Act in 1887, 28 U.S.C. §1491, and it extended this waiver in 1946 to claims made by Indian tribes (the Indian Tucker Act). As this Court held in *Mitchell II*:

> The terminology employed in some of our prior decisions has unfortunately generated some confusion as to whether the Tucker Act constitutes a waiver of sovereign immunity. The time has come to resolve this confusion. . . . we conclude that by giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims.

463 U.S. at 212. The Court explained that in *United States v. Testan*, 424 U.S. 392 (1976), and *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*"), "this Court employed language suggesting that the Tucker Act does not effect a waiver of sovereign immunity . . . . We conclude that this isolated language should be disregarded." 463 U.S. at 216. This Court further stated that "because the Tucker Act supplies a waiver of immunity . . . , the separate statutes and regulations need not provide a second waiver of sovereign immunity." *Id.* at 218-19.[3]

B. The IMLA and Associated Statutes and Regulations Create a Substantive Right Enforceable Against the United States for Money Damages.

It is a separate question whether the statutes, regulations, treaties and executive orders that form the basis of a claim under the Indian Tucker Act create a compens-

[3]The Indian Tucker Act was not applicable in *Mitchell II* because plaintiffs were Indian allottees, but the reasoning of *Mitchell II* applies with equal, if not greater, force to the waiver of sovereign immunity contained in the Indian Tucker Act, due to the broader scope of claims under that Act. *See* n.8.

able right against the United States. *Id.* at 218. The Government is incorrect in asserting that the Navajo Nation must allege violations of specific mineral leasing statutes and regulations to receive compensation.[4] The Court in *Mitchell II* did not hold that plaintiffs were entitled to damages because they alleged violations of specific timber statutes and regulations, but rather that the timber statutes and regulations as a whole specified the Government's management duties sufficiently so as to "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities." 463 U.S. at 224. This finding in turn led to the Court's holding that "[b]ecause the statutes and regulations at issue . . . clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained." *Id.* at 226. The mineral leasing statutes and regulations in this case "define the contours" of the Government's trust responsibilities sufficiently to mandate compensation for breach of those responsibilities. Once a compensable trust duty is established, the court looks to the resulting trust relationship, including trust law standards, to fill out the contours of the relevant statutory and regulatory scheme and to gauge the government's performance of its trust duty.

The Court found that the timber statutes and regulations in *Mitchell II* established compensable fiduciary obligations on the part of the Government because the Secretary had a "pervasive role" in timber sales from

[4]In its First Amended Complaint, the Navajo Nation in fact listed in its First Claim for Relief many of the Government's statutory and regulatory authorities and duties, including approval of coal leases, and alleged that the Government violated these duties (C.A. App. at 38-39).

Indian lands, *id.* at 219, the timber regulations "addressed virtually every aspect of forest management," *id.* at 220, and "virtually every stage of the process is under federal control," *id.* at 222.[5] A straightforward application of *Mitchell II* resolves the key question of compensability in this case because the statutes and regulations governing mineral leasing of Indian lands establish the Government's fiduciary obligations just as clearly as the timber statutes in *Mitchell II*, as the Federal Circuit found below. 263 F.3d at 1330. The Navajo Nation discusses in its brief the Government's supervision, management and control in the context of the coal leasing statutes and regulations at issue in this case. *Amici* have direct experience with the Government's management and control of oil, natural gas and uranium leasing of Indian lands, which take place under the same mineral leasing statutes and the same or similar regulatory schemes as coal leasing, and which also are evidence of the Government's "pervasive role" in mineral leasing.

1. The Government Regulates Virtually Every Aspect of Mineral Leasing on Indian Lands.

The IMLA applies to all mineral leasing of Indian lands, including leasing for oil, gas, coal, uranium, and even sand and gravel. *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 52 Fed. Cl. 614 (2002); 25 C.F.R. §211.3 (1997). The statute requires

[5] The Court in *Mitchell II* found a compensable breach of the Government's trust obligations for two separate reasons: the Government's management and supervision of Indian resources and the Government's control over those resources. 463 U.S. at 225. There is no need in this case for the Court to define the test with any more precision, because the mineral leasing laws satisfy both tests, just as both were satisfied by the timber statutes and regulations.

the Secretary to approve all mineral leases with Indian tribes, 25 U.S.C. §396a; requires mineral lessees to furnish bonds guaranteeing compliance with the leases "in amounts satisfactory to the Secretary," §396c; and provides that "all operations" under mineral leases "shall be subject to the rules and regulations promulgated by the Secretary," §396d.[6] *Cf. Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1564-65 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part), *dissenting opinion adopted as majority opinion as modified*, 782 F.2d 855 (*en banc*), *supplemented*, 793 F.2d 1171, *cert. denied*, 479 U.S. 970 (1986) ("*Supron*") (discussing Government's role in Indian mineral leasing). The Department's "rules and regulations" address virtually every aspect of mineral management, just as the timber regulations in *Mitchell II* "addressed virtually every aspect of forest management," 463 U.S. at 220. *See* Commission on Fiscal Accountability of the Nation's Energy Resources (January 1982) ("Linowes Commission Report"), Appendix H (listing BIA trust responsibilities re: mineral leasing), App. 16a-17a.

The Linowes Commission was charged with determining whether obligations under the mineral leasing acts were being adequately enforced and, if not, what corrective action should be taken. Report at 3, App. 8a. Because the Commission found that royalties on mineral resources were being underpaid by hundreds of millions of dollars a year, *id.* at xv, App. 5a, Congress enacted the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§1701-1757 ("FOGRMA"), in order to "clarify, reaffirm, expand, and define the authorities and responsibilities of the Secretary of the Interior to imple-

[6] The IMLA also requires that oil and gas leases be offered for sale "upon such terms and subject to such conditions as the Secretary of the Interior may prescribe." 25 U.S.C. §396b.

ment and maintain a royalty management system." 30 U.S.C. §1701(b)(2). *See generally* H.R. Rep. No. 97-859, at 15-18 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4268. Through FOGRMA, Congress reinforced the Secretary's existing duties under the Mineral Leasing Act of 1920, 30 U.S.C. §§181-263, and the IMLA. For example, the Linowes Commission Report and other investigations resulted in the creation of the Minerals Management Service ("MMS"), a special division of the Department created specifically to enforce the royalty obligations under the mineral leasing acts, *see* S. Rep. No. 97-512, at 10 (1982); *see also* H.R. Rep. No. 97-859 at 16. These investigations also resulted in the development of the Department's Auditing and Financial System ("AFS") and Production, Auditing, and Accounting System ("PAAS"), computerized systems intended to "provide the capability to perform the necessary fiscal and production accounting" for royalty payments. *Id.* at 17. Through FOGRMA, therefore, Congress made the federal royalty management system even more "comprehensive," *id.* at 28, by providing direction as to *how* the Department is to monitor mineral production and collect royalties to fulfill its underlying trust responsibility, which remained unchanged from earlier acts, including the IMLA.

Although FOGRMA directly addresses oil and gas, the additional reporting, recordkeeping and other royalty management that it requires apply also to coal, uranium and other mineral resources. FOGRMA focused on oil and gas because they were the focus of the Linowes Commission investigation, S. Rep. No. 97-512 at 11, 19, 24, but the Linowes Commission Report also stated that "it appears that the general problems of verifying production . . . and designing an effective audit program are common to all minerals," Report at 181, App. 15a. Congress acknowledged the need to investigate royalty

collection from other mineral resources besides oil and gas, S. Rep. No. 97-512 at 11, 19, 24, and specifically directed the Secretary to "study the question of the adequacy of royalty management for coal, uranium and other energy and nonenergy minerals on Federal and Indian lands" and to propose legislation "if the Secretary determines that such legislation is necessary to ensure prompt and proper collection of revenues." FOGRMA §303, codified at 30 U.S.C. §1752, Hist. Note. The study found that there was adequate authority under the existing mineral acts, making additional legislation unnecessary, and recommended that the AFS and PAAS computerized systems developed for oil and gas royalty management be extended to apply to solid minerals royalty management. *See* 51 Fed. Reg. 15,763, 15,764 (Apr. 28, 1986); *see also* 30 U.S.C. §1753(b). MMS subsequently promulgated regulations extending the oil and gas reporting requirements to coal and other solid minerals. 51 Fed. Reg. at 15,764 (placing solid minerals under the AFS); 51 Fed. Reg. 8,168 (Mar. 7, 1986) (placing solid minerals under the PAAS).[7]

Amici have experienced the government's pervasive management, supervision and control of their mineral resources pursuant to this "comprehensive" federal regulatory scheme. *Cf. Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 763 & 767 (1985); *Mitchell II*, 463 U.S. at 222. In the case of Jicarilla, all of the tribe's oil and gas leases are drawn up on standard BIA lease

[7] Certain duties with respect to oil and gas royalties are more detailed than with respect to coal royalties because there is more opportunity for theft and deception with the reporting of oil and gas volumes, quality and processing and other costs than with hard rock minerals. *See, e.g.*, H.R. Rep. No. 97-859 at 17, 33; S. Rep. No. 97-512 at 8.

forms, which specify the royalty rate that Jicarilla will receive for its oil and gas, and are signed by the Bureau of Indian Affairs to denote the Department's approval. The Bureau of Land Management approves permits for production activities, is responsible for inspection and enforcement on the leases and verifies volume reports. 43 C.F.R. §§3161.2-3161.4, 3162.7, 3163 (1985).

Royalties are due from the lessee the month after the month of production, based on the values and volumes that the lessee reports to MMS on forms that MMS provides. These forms specify the transactions that are required to be reported and the deductions that may be taken (for example, for processing costs), according to regulations and policies that are determined by MMS. 30 C.F.R. pts. 210, 218 (1985).

MMS also prescribes the formulas and procedures for lessees to value the oil and gas and to comply with other requirements of the leases. *E.g.*, 30 C.F.R. §§206.-155(a), 206.152(a)(3)(ii), 206.153(a)(3)(ii) (1988). These procedures are contained not only in the mineral leasing regulations, but also in a separate Payor Handbook that MMS publishes and distributes to lessees, one for oil and gas and another for solid minerals.

MMS verifies the accuracy of the reports that the lessees submit. MMS enters this information into its computer database and uses its own personnel to verify the data, conduct investigations and audits of reports, and ensure collection of royalty payments. In the event of noncompliance, MMS issues orders to perform, pursues enforcement actions, and imposes interest and penalties for late payments and noncompliance. 30 C.F.R. §§218.102, 241.20, 241.51 (1985). MMS also handles appeals of orders to perform, noncompliance orders, and other administrative actions. 30 C.F.R. pts. 243 and 290 (1985).

Finally, MMS supervises all payments to the tribe. The lessee either sends its checks to MMS, for subsequent distribution by MMS to the tribe (or Indian allottees), or, in some cases (including Jicarilla's), sends payments directly to the tribe. In either case MMS is responsible for ensuring that the payments are in fact sent and are for the correct amounts, based on the forms that the lessee files with MMS. *See* 25 C.F.R. §211.40 (1997), §211.12 (1985) (payments to be made to MMS); *see also* 30 C.F.R. pts. 217-219 (1985).

Laguna has experienced similar pervasive management and control by the Government with regard to mining and processing of uranium from its Reservation. Many of the regulations cited above, or ones similar to them, apply to uranium as well as to oil and gas. *See generally* 30 C.F.R. pts. 216-218 (2001). In addition, most of the leasing regulations for uranium were the same as for coal during the relevant period, requiring Secretarial approval and regulating each step of the leasing and mining process. *See* 25 C.F.R. pt. 211 (1985). The regulations prescribed a minimum royalty rate that differed from coal, §211.15(a) (1985), but similarly required that royalties be paid to the Government "for the benefit of the lessors." §211.12 (1985). As with coal, the regulations required the submission of detailed exploration and mining plans for approval by the "mining supervisor," the Regional Mining Supervisor of the U.S. Geological Survey. §§216.6-.7 (1985). In short, the Government controlled every aspect of uranium leasing, mining, and royalty collection, often to the complete exclusion of Laguna. In addition, because of uranium's strategic and radioactive nature, national security and environmental concerns regarding uranium added, and add, further layers of regulation regarding uranium pos-

session, production, storage, and transportation. *See, e.g.*, Atomic Energy Act of 1954, 42 U.S.C. §§2011-2297g-4; Uranium Mill Tailings Radiation Control Act of 1978, 42 U.S.C. §§7901-7942; 10 C.F.R. §40 (2001) (regulating domestic source material).

Amici and other mineral resource tribes simply do not have the resources, expertise or other capabilities to manage and oversee the types of mineral leasing activities described above, a fact that Congress has understood for over a century. Indeed, as this Court noted in *Mitchell II*, "it was the very recognition of the inability of the Indians to oversee their interests that led to federal management in the first place." 463 U.S. at 227. The Government's role in overseeing mineral leasing activities for Jicarilla and Laguna illustrates the degree of federal management and control that takes place under the federal mineral leasing statutes and regulations, confirming that the federal statutory and regulatory scheme "defines the contours" of the Government's fiduciary responsibilities, *id.* at 224, and so creates a compensable right under the holding of *Mitchell II*.

2. The IMLA and Implementing Regulations Require the Government to Maximize Tribal Revenues from Mineral Leasing, and the Trust Relationship Reinforces this Obligation.

The legislative history of the IMLA helps delineate these "statutory contours," confirming that the IMLA was intended "to give the Indians the greatest return from their property." S. Rep. No. 75-985, at 2 (1937); H.R. Rep. No. 75-1872, at 2 (1938); *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985) (IMLA's purpose is to maximize tribal revenues); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 n.5 (1985) (IMLA was intended "to ensure that Indians receive the greatest return from their property"). Moreover, when urging enactment of the IMLA, the Secretary singled out the need to revise the coal leasing laws to enable tribes to receive greater revenues. S. Rep. No. 75-985 at 2-3; H.R. Rep. No. 75-1872 at 2-3.

The Government argues that it was not obliged to maximize the Navajo Nation's revenues from the tribe's coal resources, as the IMLA requires, because the authority to adjust the royalty rate came from the lease rather than from the IMLA, and because the adjusted royalty rate that the Government ultimately approved satisfied the minimum rate specified in the Department's regulations. The Government forgets that its obligations under the Indian mineral leasing laws must be determined in light of the "trust relationship between the United States and the Indian people." *Mitchell II*, 463 U.S. at 225; *accord Seminole Nation v. United States*, 316 U.S. 286, 295 (1942). As a trustee, the Secretary has "moral obligations of the highest responsibility and trust" and his conduct is "judged by the most exacting fiduciary standards." 316 U.S. at 297; *see also* 297 n.12 ("As was well said by Justice Cardozo . . . [citation omitted] . . . [n]ot honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior"). The IMLA requirement for the Secretary to maximize tribal revenues from mineral leasing is "reinforced" by the Secretary's obligations as trustee, *Mitchell II*, 463 U.S. at 226, which also require the Secretary to act in the best interests of the tribe. The statutory requirement to maximize tribal revenues from mineral leasing therefore extends to the Secretary's interpretation of the leases and regulations, precisely because the Secretary is acting in his fiduciary role, as the court held in *Supron*.

In *Supron*, in ruling on the Secretary's obligations under the Indian mineral leasing laws, the Tenth Circuit held that the Secretary was obliged to interpret the Tribe's leases and the Department's own regulations in the manner that resulted in the greatest benefit to the tribe. The court therefore invalidated the Department's interpretation of its own regulations. The court reached this conclusion despite the fact that the leases specifically referred to the Secretary's discretion, and that the Secretary's interpretation conformed with long-standing policy and industry practice and was not arbitrary or capricious. As Judge Seymour explained in the opinion subsequently adopted by the court *en banc*, "the most significant error the majority makes is its employment of administrative law analysis without considering what role, if any, the Secretary's fiduciary duty should play in a court's examination of his administrative action." 728 F.2d at 1566. Because of the Secretary's fiduciary duties, "the Secretary must choose the alternative that is in the best interests of the Indian tribe. In short, he cannot escape his role as trustee by donning the mantle of administrator." *Id.* at 1567.[8]

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989), is not to the contrary. The Court in *Cotton Petroleum* did not deny the Secretary's fiduciary duty to maximize tribal revenues in the administration of Indian mineral leases, and in fact referred to its decision in *Montana v. Blackfeet* for that very proposition. 490 U.S. at 179, quoting 471 U.S. at 767, n.5. Instead, the

[8]Moreover, the Indian Tucker Act specifically refers to treaties and executive orders as bases for compensable claims against the Government (in addition to claims cognizable under the Tucker Act), further supporting the principle that the trust relationship informs the Government's duties under the specific statutes claimed.

Court addressed, under a preemption analysis, a state's right to tax oil and gas revenues of non-Indians operating on Indian leases, and specifically found that the state tax did not interfere with the tribe's ability to raise its own tax or with the federal policy of obtaining the maximum return on tribal minerals.

Most often, acting in a tribe's best interest will mean maximizing revenue from a lease. There may be some instances in which cultural, environmental, or other cognizable concerns would allow the Secretary to approve an economic result that is something less than the maximum. For example, the Indian Mineral Development Act of 1982, 25 U.S.C. §§2101-2108, discussed more fully below, expressly recognizes that such factors may be relevant in determining a tribe's best interest, §2103(b), as do the current regulations, 25 C.F.R. §211.1(a) (2002). In the case before the Court, however, there were no countervailing interests *of the Navajo* that would allow the Secretary to obtain less than the best economic result for the Navajo Nation: he was simply pandering to the "best interests" *of Peabody*, the lessee, in blatant violation of the IMLA and the regulations.

In this case, the Secretary violated the requirements of the Indian mineral leasing laws and his trust obligations under those laws. The Secretary did not merely fail to interpret and enforce the Navajo Nation's lease terms so as to maximize the tribe's revenues from its coal, but actively subverted the purpose of the IMLA by meeting secretly with the tribe's lessee and suppressing a decision in the Navajo Nation's favor so as to ensure that the Navajo Nation would *not* receive the full amount of royalties to which it was entitled. Moreover, the Secretary approved the amended leases even though he knew that the

Navajo Nation could have received more for its coal, were it not for his own actions and those of officials in his Department. These breaches of trust in the implementation of the Department's duties under the IMLA surely are specific enough to warrant compensation.[9]

II.

THE GOVERNMENT'S ATTEMPT TO RELEGATE ITS TRUST RESPONSIBILITIES TO A "BACKSTOP" ROLE, IN THE GUISE OF ENCOURAGING TRIBAL SELF-DETERMINATION, IS CONTRARY TO THE EXPRESS INSTRUCTIONS OF CONGRESS.

The IMLA specifically requires the Secretary to approve leases and to establish "rules and regulations" to govern Indian mineral leasing. 25 U.S.C. §§396a, 396d. The Government would turn the Secretary's approval and standard-setting authority into a mere "backstop protection," Pet. Br. at 38, 43, 49, arguing that to do otherwise would conflict with the goal of tribal self-determination. Congress, however, has demonstrated in many statutes and over many decades that it intends the Government to be held accountable for mismanagement of the Indian trust, notwithstanding Congress' goal of increasing tribal self-determination and self-sufficiency. Congress also has shown itself perfectly capable of balancing these two principles as the circumstances require.

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[9] Besides, as the Court in *Mitchell II* points out, 463 U.S. at 226-27, it would not make sense for Congress to require the Government to manage mineral resources under the IMLA in a tribe's best interest and at the same time for the courts to allow the Government to ignore this obligation without there being any consequences.

A. Congress is Aware of and Intentionally Made the Government Liable for Breaches of Its Trust Responsibilities.

The Indian Tucker Act was enacted as part of the larger Indian Claims Commission Act, which Congress intended to be a comprehensive method of dealing with historical and future Indian claims. *See generally*, H.R. Rep. No. 79-1466 (1945), *reprinted in* 1946 U.S.C.C.S. 1347. Charged with hearing Indian claims accruing before August 13, 1946, the Indian Claims Commission had jurisdiction to hear both legal and equitable claims, including claims regarding unfair or dishonorable dealings that would not otherwise be cognizable against the Government. At the same time, the Indian Tucker Act ensured that Indians would have access to the courts for future claims. It is apparent from the statutory scheme and from the legislative history that Congress found it imperative for the United States to abide by its obligations for all Indian claims, including ones arising after passage of the Act:

> [T]he present generation of Indians is entitled to claim the funds that were set aside in trust for them, in place of the lands that they would own today if these transactions had never been consummated. If we fail to meet these obligations by denying access to the courts when trust funds have been improperly dissipated or other fiduciary duties have been violated, we compromise the national honor of the United States.

H.R. Rep. No. 79-1466 at 5.

The principle in this statement is unchanging. As the Committee noted:

> It is sometimes said that those Indians who suffered most under mistaken Federal policy or under the

> maladministration of good policies by weak or faithless public servants have passed on and that there is no reason to compensate their descendants for old injuries. But it was the Federal Government that insisted on dealing with the Indians as continuing corporate entities, and on holding payments on land sales for the benefit of later generations.

Id. Moreover, as numerous government studies and congressional hearings have confirmed, "maladministration" of the Indian trust has continued, and the Indian Tucker Act was intended to address such instances of mismanagement. The instant case demonstrates that "weak or faithless public servants" were not solely a product of the nineteenth and early twentieth centuries. The Government's basic argument – that it has trust obligations but the Navajo Nation is prohibited from obtaining damages for their breach – is thus counter to fundamental provisions of fairness that are a cornerstone of our courts and political system and that drove the passage of the Indian Tucker Act.

Congress' intent that the Government be liable for breach of its trust responsibilities is confirmed by congressional reference cases, 28 U.S.C. §§1492, 2509. Congressional reference cases are private bills referred by Congress to the Court of Federal Claims (or its predecessor courts) for a recommendation on the merits. Absent other direction from Congress, the court is charged with determining whether a claim is legal or equitable, or would constitute a gratuity. 28 U.S.C. §2509(c).

The court is often asked to consider claims that would have been cognizable but for the statute of limitations. In the Indian trust claim context, this procedural posture is significant because it shows that Congress is willing to award damages based on a legal analysis by the court that, but for the limitations issue, is identical to that

otherwise applied by the courts, including this Court in *Mitchell II*. A prime example is *Menominee Indian Tribe of Wisconsin v. United States* ("*Menominee I*"), 39 Fed. Cl. 441, 456-57 (1997).

The Menominee Tribe was chosen for early termination during the era in the 1950s and early 1960s when cost-saving measures led Congress to terminate the trust relationship with some tribes; the Menominee Termination Act was passed in 1954, and the tribe was terminated in 1961. *See Menominee I, id.* at 450-54. Congress ultimately recognized that termination had left the tribe (and other tribes) without the resources or experience to govern themselves; it restored the trust relationship with the Menominee Tribe in 1973. 25 U.S.C. §§903-903f. While terminated, the tribe brought suit against the Government in the United States Court of Claims, alleging that the Government had mismanaged the tribe's sawmill, trust funds, timber, and other resources in the years prior to termination and that the termination itself was improper. *Menominee I*, 39 Fed. Cl. at 444-47. The sawmill mismanagement claim and portions of the forest mismanagement claim were dismissed based on the statute of limitations.[10] *Menominee Tribe of Indians v. United States*, 726 F.2d 718, 722 (Fed. Cir. 1984). The tribe was left with no recovery.

Congress reacted in 1993 with the congressional reference. Based on *Mitchell II*, the Court of Federal Claims concluded that "the web of statutes and treaties created an obligation in BIA to operate and maintain the mill for the benefit of the Tribe *as a fiduciary would*." *Men-*

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[10]The court dismissed the wrongful termination claim and other portions of the forest mismanagement claim because recovery would have required finding that a constitutional act of Congress was a cognizable legal wrong. *See* 39 Fed. Cl. at 444-46.

ominee I, 39 Fed. Cl. at 462-63 (emphasis added).[11] The tribe and the Department of Justice subsequently agreed to a settlement of all claims, which the court approved. *Menominee Indian Tribe of Wisconsin v. United States* ("*Menominee II*"), 41 Fed. Cl. 525, 527 (1998). Congress approved the settlement in its entirety, expressly recognizing that a portion of the damages was based on "the mismanagement by the United States of assets of the . . . Tribe held in trust by the United States before April 30, 1961, the effective date of termination of Federal supervision of the . . . Tribe." Act of Aug. 17, 1999, Pub. L. 106-54, §3(a)(2), 113 Stat. 398. Congress thus both recognized the Government's potential liability for the Indian trust and also made clear that the Government should not attempt to evade liability.

B. Congress Knows How to Limit the Government's Trust Responsibility, and Did Not Do So in the IMLA.

Under *Mitchell II* and the Indian Tucker Act, what matters is whether *Congress* intended the Government to be liable for breach of trust under any particular treaty or statute.[12] Congress' intent that the Government be liable for mismanagement in Indian mineral leasing is clearly expressed in the IMLA, as discussed in Part I above. In other statutes, Congress has made clear that it knows how to limit the Government's liability when it

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[11] The court reiterated the earlier conclusion that there could be no recovery for the wrongful termination claim. *Menominee I*, 39 Fed. Cl. at 459-62.

[12] Under proper circumstances, liability can also be created under the Indian Tucker Act by the executive through lawful regulations and executive orders.

sees fit, and the fact that Congress did not do so in the IMLA is further evidence of the Government's comprehensive trust responsibilities under that act.

For example, in 25 U.S.C. §415, which addresses leasing of Indian lands in restricted ownership, Congress limited the liability of the Secretary when the Navajo Nation approves *non-mineral* leases. Mineral leases continue to require Secretarial approval. The logical implication of this juxtaposition is that the Secretary remains liable for breaches of trust relating to mineral leases, an understandable decision in light of the extensive resources that proper supervision of mineral leases requires, as discussed in Part I, *supra*.

Section 117 of Title 25 allows tribes to make per capita distributions to tribal members directly from tribal accounts, rather than having those payments issued by the Government as had been required previously. In §117c, Congress eliminated the Government's liability for such distributions as long as the Secretary approves the distribution plan in accordance with reasonable standards established by regulation. Other statutes eliminate the Government's liability if a tribe elects to take funds out of trust and have them managed by a third party. *E.g.*, 25 U.S.C. §4022 (allowing tribes to withdraw funds from trust, after which "any trust responsibility or liability of the United States with respect to such funds shall cease"); 25 U.S.C. §941i(c) (allowing Catawba Indian Tribe to withdraw certain settlement funds from trust pursuant to management plan approved by the Secretary).

Congress also is aware of how to limit the Government's liability for land and natural resources, as it did in 25 U.S.C. §1754, regarding settlement of Connecticut Indian land claims. Subsection (b)(7) provides that

lands within a specific settlement area "shall be held in trust by the United States for the benefit of the Tribe." In contrast, subsection (b)(8) provides:

> Land or natural resources acquired under this subsection which are located *outside* of the settlement lands shall be held in fee by the Mashantucket Pequot Tribe, and *the United States shall have no further trust responsibility with respect to such land and natural resources.*

(emphasis added).

Similarly, 25 U.S.C. §941j*(l)*, part of the codified settlement with the Catawba Indian Tribe, allows the tribe to lease its lands "with or without approval of the Secretary." Significantly, Congress stated:

> With regard to any lease of Reservation lands not approved by the Secretary, the Secretary shall be exculpated by the Tribe from any liability arising out of any loss incurred by the Tribe as a result of the unapproved lease.

Id. The negative implication is unmistakable: Congress' assumption was that if the Secretary exercises his approval authority, the Secretary is not released from subsequent liability resulting from that approval.

These statutes show that Congress is fully capable of limiting or even terminating the Government's trust responsibility when it chooses, and the fact that Congress did not do so in the IMLA is telling. They also show that Secretarial approval is automatically associated with liability. Accordingly, if Congress wishes to exculpate the Government even where some form of Secretarial approval is required, it does so explicitly, *e.g.*, 25 U.S.C. §941i(c). *See also* 25 U.S.C. §§415(e)(5), 941j*(l)*

(exculpating the United States when a tribe is allowed to bypass Secretarial approval). Congress did not exculpate the Government in the IMLA, and so liability for the Government's comprehensive trust responsibilities remains.

C. Congress Balances the Trust Responsibility with the Goal of Tribal Self-Determination as Circumstances Require.

Congress also knows how to balance the Government's trust responsibilities with the goal of encouraging tribal self-determination, despite the Government's contentions that the two principles are in conflict. In fact, the IMLA provides an early example of Congress' recognition of tribal governments after the allotment era: it gives tribes the right to enter into mineral leases. However, the statute makes the Secretary responsible for approving those leases to ensure that they are in the best interests of the tribe, and requires the Secretary to oversee and manage those leases in the comprehensive manner described in Part I, above.[13]

When it became apparent that the Secretary was failing to perform his duties under the IMLA, as the Linowes Commission and other investigations concluded,

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[13] The Government gives the impression that the Indian Reorganization Act of 1934, 25 U.S.C. §§461-492, provided tribes with total control over their own concerns. While the IRA was certainly a significant shift in federal Indian policy and signaled the return to a modicum of respect for tribal institutions, it retained a significant role for the United States as trustee. For example, one of the statutes giving rise to liability in *Mitchell II* was in fact part of the IRA. *See* 25 U.S.C. §466. The IRA did not end the trust responsibility; just the opposite, it affirmed that Congress intended to take that responsibility seriously even after the reconstitution of tribal governments.

Congress followed two different courses of addressing the problem: it enacted FOGRMA, which if anything increased the Secretary's role over mineral leasing, and the same year (1982) it enacted the IMDA, which gave tribes the opportunity to exercise more independence in the area. The IMDA is a prime example of Congress' balancing of the trust responsibility with tribal self-determination.

Despite leaving much authority to tribes, the IMDA specifically requires that, before approving a minerals agreement, the Secretary "shall determine if it is in the best interest of the Indian tribe or of any individual Indian." 25 U.S.C. §2103(b). At the Department's insistence, *see* H.R. Rep. No. 97-746, at 7-8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1938, a provision was added to the IMDA regarding the Secretary's liability:

> **Nonliability of United States; continuing obligations.**
> Where the Secretary has approved a Minerals Agreement *in compliance with the provisions of this chapter* and any other applicable provision of law, the United States shall not be liable for losses sustained by a tribe or individual Indian under such agreement: *Provided*, That the *Secretary shall continue to have a trust obligation to ensure* that the rights of a tribe or individual Indian are protected in the event of a violation of the terms of any Minerals Agreement by any other party to such agreement: *Provided further*, That nothing in this chapter shall absolve the United States from any responsibility to Indians, including those which derive from the trust relationship and from any treaties, Executive orders, or agreement between the United States and any Indian tribe.

25 U.S.C. §2103(e) (emphasis added). The calculus is simple: if the Secretary approves a minerals agreement in compliance with the other provisions of IMDA, the tribe assumes any business risk. However, for the Secretary to approve an agreement "in compliance with the provisions of this chapter" requires the Secretary to find that the agreement is in the "best interest" of the tribe in light of the factors listed in §2103(b), and the Secretary is liable if he does not make a best interest determination. The two provisos spelling out the continued obligations of the Secretary highlight that the "nonliability of the United States" is limited to risks that the tribe knowingly undertakes, and that the Secretary remains liable for failure to review and enforce the agreement and for other trust duties.

The House committee explained that the hold harmless language in the Act "simply restates the law as it exists today," H.R. Rep. No. 97-746, at 7 (1982), in other words, the law as it exists under the IMLA. In addition, the Committee noted:

> Representatives of concerned Indian tribes were alarmed at the Administration's recommendation and viewed it as a total release of the United States' responsibility as trustee. While this was not the case, the Committee sought to allay their concerns by adding the proviso contained in subsection(b) [now in 25 U.S.C. §2103(e)]. This, too, simply restates the existing law. The United States cannot be held to be a guarantor of the business enterprises of an Indian tribe nor an insuror against business losses from the implementation of an agreement nor against acts of God. Nevertheless, the Secretary retains an obligation to see that the non-Indian parties do not violate or vary the terms of the agreement to the detriment of the Indian parties. The

> Committee has had recent examples of this in the allegations of loss of royalties under Federal and tribal oil and gas leases because of inadequate monitoring and review of company activities and reporting.

H.R. Rep. No. 97-746 at 8. There is a legally dispositive difference between the Secretary being an insurer against risks outside of the Secretary's control and the Secretary taking actions that guarantee that a tribe will receive less than it could otherwise receive for its resources. The latter is antithetical to a trustee's role and cannot in any way be interpreted as supporting the best interest of the tribe.

The Indian Self-Determination and Education Act of 1975, 25 U.S.C. §§450-458bbb-2, is perhaps Congress' most significant effort to encourage tribal self-determination, and it too shows congressional intent to reaffirm the trust relationship. It allows a tribe to contract or compact with the Government to take over the provision of program services otherwise provided by the Government. The funding available to the Government for the program is made available to the tribe. Despite this considerable transfer of day-to-day control to tribes, Congress "declare[d] its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people" and specified that "[n]othing in this subchapter shall be construed as . . . authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people." 25 U.S.C. §§450a(b), 450n; *see also* 25 U.S.C. §458cc(b)-(9), 458aaa-14(b) (similar reservations and protections of existing trust responsibility); 25 C.F.R. §1000.302 (2002) (reassumption of a program if tribe disregards "Federal trust standards").

Tribal self-sufficiency is a stated goal of Congress, *see, e.g.*, 25 U.S.C. §§450a, 2702(1), and the ideal in Indian country. Encouraging the development of tribal expertise and experience to manage complex affairs is an essential step in attaining that goal. But the continuing trusteeship of the United States is also essential. The United States has resources – human, logistical, and financial – that even the largest and richest tribes cannot possibly match. If tribes are to become self-sufficient, it is also imperative that they receive the maximum amount possible for their resources (which in the instant case were non-renewable). Given the paltry tax base of most tribes, self-sufficiency can never come about without adequate capitalization. For a significant number of tribes, natural resource development is the only realistic source of capital.

The Government's trust duties and tribal self-determination are complementary in many instances, and Congress has recognized that fact by preserving the former while encouraging the latter. Where Congress has chosen, it has limited the trust responsibility when greater control is transferred to a tribe. But as the brief survey of statutes above illustrates, such exculpation follows only when the Secretary is eliminated from the decision-making and management process. The Secretary's continuing oversight and management role in mineral leasing precludes any inference that Congress meant to absolve the Secretary of liability for breach of trust responsibilities. In fact, the Secretary's own regulations underscore the legal significance of a secretarial approval requirement in a statutory and regulatory regime. As 25 C.F.R. §211.29 (1985) states: "The [IMLA] regulations in this part . . . shall apply to leases made by organized tribes *if the validity of the lease depends upon the approval of the Secretary of the Inter-*

ior." *Id.* (emphasis added). In other words, the applicability of the entire comprehensive regulatory regime in Part 211 hinges on whether Secretarial approval of a lease is required.[14] Despite the Government's attempts to diminish the importance of this so-called "backstop protection," Secretarial approval is the pivotal legal requirement in triggering detailed federal trust oversight under the IMLA regulations and in many of the statutes discussed above. While the Executive Branch may fear liability for its failures, Congress and this Court have achieved a proper balance regarding the Indian trust. A finding of a compensable breach in this case will reaffirm that the United States, specifically the Secretary, must administer the Indian mineral trust honestly and with a tribe's best interest as the guiding principle.

CONCLUSION

The decision of the U.S. Court of Appeals for the Federal Circuit should be affirmed.

Respectfully submitted,

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October 9, 2002

[14] Under the Indian Reorganization Act, tribal law – most likely a tribal constitution – can sometimes preclude the application of federal regulations, as 25 C.F.R. § 211.29 recognizes.

APPENDIX

REPORT OF THE COMMISSION

FISCAL ACCOUNTABILITY OF THE NATION'S ENERGY RESOURCES

[SEAL]

David F. Linowes
Chairman

Michel T. Halbouty

Mary Gardiner Jones

Charles J. Mankin

Elmer B. Staats
Commissioners

JANUARY 1982

* * *

PREFACE

The Commission on Fiscal Accountability of the Nation's Energy Resources has completed the tasks established for it in its Charter of July 8, 1981. Those tasks were:

- To examine the allegations of massive irregularities in royalties on the Nation's energy resources which are owed to the Federal government, Indian tribes, and States;
- To investigate the allegations of theft of oil from Federal and Indian lands; and
- To make recommendations for improving fiscal accountability of the Nation's energy resources.

The Commission's findings and recommendations are set forth in this report. Each of the recommendations was adopted unanimously by the Commission.

The Commission could not have completed its work on these complex and urgent matters in a timely fashion without the active cooperation of a great many people and institutions. Throughout the life of the Commission, our activities were coordinated with the President's Council on Integrity and Efficiency in Government. We received unstinting help from the Department of the Interior; from other government agencies, such as the General Accounting Office, the Internal Revenue Service, and the Office of Management and Budget; as well as from Members of Congress and their staffs.

The Commission was also aided immeasurably by States, Indian tribes, the oil and gas industry, and private citizens who appeared before the Commission at five sets of comprehensive public hearings. Many of those testifying provided followup assistance as well.

We are also indebted to scores of other individuals who gave their time and professional expertise. We particularly want to recognize the competent contributions and unfailing assistance of William L. Kendig, Director of Financial Management of the Department of the Interior, and Wiley W. Horsley, Jr. and Richard E. Powers of that office. Milton J. Socolar, John F. Simonette, Jeffrey C. Steinhoff, and Darby W. Smith of the General Accounting Office were most responsive to the Commission's needs. Dallas L. Peck, Doyle G. Frederick, R. Michael Gall, and J. Ronald Jones of the U.S. Geological Survey all cooperated generously and graciously.

Our staff, led by its Executive Director, Charles L. Elkins, performed with unusual devotion to our demanding schedule. Our sincere appreciation to each of them.

Finally, the Commission wishes to acknowledge that much of its effort rests on a body of work on oil and gas royalty management completed over the last twenty years by the General Accounting Office, the Department of the Interior, and various Congressional committees.

The Commission's charge broadly covers the Nation's energy resources, which include hard mineral energy resources such as coal and uranium as well as oil and gas. We are aware of problems in the management of coal and uranium royalties, and these are briefly addressed in Chapter Eight of this report. But for the present and the near future, oil and gas are dominant, providing 97 percent of the royalties from Federal and Indian energy resources. For this reason, this report essentially is focused on oil and gas.

The Commission has viewed its efforts as contributing to the prudent management of the country's energy resources, and to stopping any loss of revenues rightly due

to the Federal government, the States, and Indians. Equally, we recognize that democratic institutions rest on a foundation of faith in the competence and accountability of government. We believe that the measures recommended by this Commission can help to strengthen that faith.

David F. Linowes
Chairman

SUMMARY

Management of royalties for the Nation's energy resources has been a failure for more than 20 years. Because the Federal government has not adequately managed this multibillion dollar enterprise, the oil and gas industry is not paying all the royalties it rightly owes.

The government's royalty recordkeeping for Federal and Indian oil and gas leases is in disarray. For this reason, the exact amount of underpayment is unknown. The results of individual audits, which have often uncovered large underpayments, suggests that hundreds of millions of dollars due the U.S. Treasury, the States, and Indian tribes are going uncollected every year.

In addition, oil thefts are occurring on Federal and Indian leases. The extent of theft and the amount of royalty losses from theft are unknown, but it is well-documented that security at many Federal and Indian lease sites is lax and is an open invitation to theft.

The Nation can no longer afford mismanagement of royalties for its energy resources. The stakes are too high. With the rapid escalation of energy prices, oil and gas royalties have risen from less than $500 million in 1971 to more than $4 billion in 1981.

The government's royalty management system needs a thorough overhaul. This report of the Commission on Fiscal Accountability of the Nation's Energy Resources details 60 specific recommendations (listed in Chapter Nine of the report) for revising and rebuilding the system. Underlying these recommendations are some fundamental conclusions the Commission reached in the course of its intensive inquiry:

- *The government's royalty management systems must have qualified managers.* The scientifically oriented Geological Survey, which now manages royalties, has never been able to supply the active, sophisticated management that is needed. It is largely for this reason that the Commission recommends removing the royalty management function from the Geological Survey. In a separate office with a clearly defined mission, royalty management could attract managers with the training and experience required.
- *The Federal government should work more closely with States and Indian tribes.* In fulfilling its royalty management responsibilities, it should cooperate much more than it has in the past with States and Indian tribes, sharing both information and specific tasks, such as auditing and site inspection.
- *The Federal government should perform an oversight role.* It must not waste its limited resources on tasks that are industry's responsibility. In managing royalty collection, it should not remain mired in bookkeeping details that rightly belong to the lessee. Instead, it should develop systematic, independent cross checks of royalties paid and reports submitted by companies, and it should impose meaningful penalties for false statements or gross errors. In helping to prevent theft, the government should not issue detailed, rigid regulations for security of lease sites. Rather, it should monitor the companies' performances in carrying out their own site security plans and should penalize violations.

- *The oil and gas industry should carry out its obligation, as lessee, to pay royalties in full and on time.* The industry, not the govenment, has primary responsibility for the detailed record-keeping needed to assure that all royalties are paid. The industry also has the obligation to assure the security of lease sites. The industry, not the government, is best suited to develop effective site security plans, subject to the government's minimum standards.

If there is one concept that sums up the Commission's overall approach, it is accountability. Oil and gas companies must be held accountable for the obligations they undertake when they lease Federal and Indian lands for minerals production. The Federal government must be held accountable for fulfilling a public trust, that is, assuring that royalties for the Nation's energy resources are fully and fairly collected on behalf of the people of the United States.

The Federal government has not fulfilled this trust in the past 20 years. It is now taking steps to better its performance. Complex and demanding as the task may be, it is achievable if the internal controls, site security standards, and sanctions recommended here are made part of an improved royalty management system.

CHAPTER ONE

INTRODUCTION

In 1981, the Federal government collected more than $4 billion in royalties on oil and gas produced on Federal and Indian lands. As energy prices rise and the leasing of Federal lands accelerates, royalties will multiply.

Serious questions have been raised concerning the management of these royalty collections:

- Is the Department of the Interior collecting all of the royalties which are owed by those who lease Federal and Indian lands for energy resource development?
- Are Federal and Indian lease sites adequately protected to prevent the theft of oil?
- If not, what corrective actions should be taken?

These, in essence, were the questions which the Commission on Fiscal Accountability of the Nation's Energy Resources was charged with answering.

In particular, the Commission was asked to investigate allegations of underpayment of royaties due to Federal and Indian landowners and the theft of oil from these lands, and to recommend changes to resolve problems which may exist. This report presents the Commission's findings and recommendations for corrective actions.

Underpayment of royalties is a longstanding concern, emerging repeatedly in government reports and audits over the last two decades. The General Accounting Office, the Interior Department's Office of Inspector General (formerly the Office of Audit and Investigation), the U.S. Geological Survey, and witnesses before Congressional committees and this Commission all have documented serious defects in the governments's royalty collection system which have resulted in losses of revenues. More recently, outright physical theft of oil from Federal and Indian lands has come to light, raising serious doubts about the adequacy of site security measures.

Many aspects of royalty management are inherently difficult: complex price controls, complications introduced by the Windfall Profit Tax, division of responsibilities for lease management among various agencies, rapid growth in the production and value of the minerals, and an increasing number of widely scattered leases. The Commission recognizes that, given these complexities, no agency could perform perfectly. Nevertheless, major improvements in the Federal royalty management program should and can be undertaken.

Budget cuts and belt tightening by the Federal government underscore the importance of proper collection of royalties. While there is no way to measure accurately the revenue losses due to undercollection of royalties, some estimates place the loss as high as several hundred million dollars a year.

Effective collection of royalties has always been, and continues to be, an important matter of equity and good government. But the escalation of oil and gas prices has sharpened the issue in a very practical way. The barrel of oil that cost less than $3 in 1971 is now selling for more than $30. Federal oil and gas royalties have increased in much the same proportions, from less than half a billion dollars in fiscal year 1971 to an estimated $5 billion in fiscal year 1982. The Department of the Interior estimates that oil and gas and other mineral royalties

could amount to more than $8 billion in fiscal 1984 and well over $14 billion in 1990.*

At the same time that high oil prices have raised the value of the Federal and Indian resources, they have also increased the temptations for theft. For example, a few minutes spent loading a 100-barrel tank truck at an unsecured lease site could be worth as much as $3,000 to a thief. The rewards for improper reporting of sales (or "paper theft") can be even higher, with less effort and risk on the part of the thief.

THE CONCERNS OF STATES AND INDIANS

States and Indian landowners have an important stake in the full and correct payment of royalties. States share half the royalties for mineral resources produced on Federal lands within their borders (Alaska receives approximately 90 percent). In fiscal year 1980, the States' share of royalties for onshore leases was $315 million; Wyoming, the biggest beneficiary, collected $115 million. Twenty-three States now share royalties from Federal onshore lands, using the money to provide essential government services.

Moreover, the States benefit from the $900 million Federal Land and Water Conservation Fund. This fund is financed each year by a portion of Federal revenues from offshore oil and gas. The States receive grants from the fund to cover part of the cost of acquiring and developing recreation projects.

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*On January 5, 1982, the U.S. Geological Survey revised downward its projections of future royalties, from $6.5 billion in 1982 to $5 billion, and from $22 billion in 1990 to $14.6 billion. This report uses the newly revised forecasts. The figures are for gross royalties, which include the Windfall Profit Tax.

Indian tribes and individual Indian landowners (allottees) receive 100 percent of the royalties derived from mineral resources leases on their lands. These minerals, especially oil and gas, are today the most valuable property on Indian trust lands, and are highly significant sources of income to their owners. In fiscal year 1980, the Bureau of Indian Affairs reported that 33 tribes received $164 million in oil and gas revenues and $33 million in revenues for other minerals (such as coal, copper and uranium). By contrast, all of the 300 federally recognized tribes received $117 million for forestry rights and $55 million for grazing and other surface rights in 1980.

The Federal government shares the concerns of Indian landowners in the prudent management of their energy resources. Moreover, the Federal government has a special responsibility as trustee for proper management of Indian natural resources. However, concern about underpayment of royalties and oil theft has risen sufficiently among Indian landowners that several tribes have engaged their own investigators, technicians, and lawyers to protect what they consider to be their rightful claims.

The States, too, are anxious about the adequacy of the Federal government's royalty management effort and what the implications are for their share of the revenues. California has brought suit against the Federal government, demanding an accounting of royalties back to 1920, and the establishment of a more reliable royalty management system. Ten other States – Colorado, Arizona, Utah, New Mexico, Idaho, North Dakota, South Dakota, Montana, Nevada and Washington – have supported California as friends of the court.

Committees and Members of the Congress have been expressing concern. Within the last year, five Congressional committees and subcommittees probed the related issues of underpayment of royalties and oil theft.* The news media – press, radio and television – have also aired the allegations.

WHO HAS THE RESPONSIBILITY?

In the Mineral Leasing Act of 1920, the Congress assigned the responsibility of managing the development of mineral resources on public lands to the Department of the Interior. The Bureau of Indian Affairs (BIA) and the Bureau of Land Management (BLM) are in charge of leasing these lands for exploration and development. The U.S. Geological Survey (USGS) – specifically, the Survey's Conservation Division – oversees actual operations on the lease site. With regard to royalty management for oil and gas, the Conservation Division:

- Obtains reports on lease production, sales, and royalties paid;
- Collects and records royalties paid and due; and
- Monitors the lessee's activities for site security and production verification.

The funds are placed in U.S. Treasury accounts and then are disbursed by the BIA and BLM to the Indians and the States. The Federal share remains in the U.S. Treasury.

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*Senate Select Committee on Indian Affairs; Senate Energy and Natural Resources Committee; House Committee on Government Operations, Subcommittee on Commerce, Consumer and Monetary Affairs; House Committee on Interior and Insular Affairs, Subcommittee on Mines and Mining, and Subcommittee on Oversight and Investigations.

HOW THIS REPORT IS ORGANIZED

Chapter Two of the report outlines the current problems of royalty collection and theft which have aroused government and public concern, and which led to the establishment of this Commission. The chapter is based upon the record before the Commission, including five sets of hearings with testimony from 129 witnesses; several onsite inspections; and reviews of major reports and additional material from the General Accounting Office, audits and other reports by the Department of the Interior, and hearings and reports by Congressional committees.

The remaining chapters deal with the Commission's findings and recommendations:

Chapter Three:	Internal Controls
Chapter Four:	Site Security
Chapter Five:	Enforcement
Chapter Six:	States and Indian Tribes
Chapter Seven:	Organizational Issues
Chapter Eight:	New Approaches to Royalty Management
Chapter Nine:	Summary of Recommendations

These chapters weigh the testimony of the many knowledgeable people who appeared before the Commission and consider proposals made in previous reports. They draw on the valuable advice of States and Indian tribes which have had experience in royalty management.

Each of the chapters presents recommendations for actions by the Executive Branch and the Congress to assure proper accountability of the management of the Nation's energy resources.

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A NOTE ON SOLID ENERGY MINERALS

The Commission directed its inquiry almost entirely to management of royalties for oil and gas produced from Federal and Indian lands. As production of other energy minerals – coal, uranium, possibly oil shale – increases, royalty management for these minerals also will take on added significance. In 1980, royalties for the solid energy minerals produced from Federal and Indian lands amounted to $49 million – $40 million for coal, $9 million for uranium, and a negligible amount from oil shale. This compares with $2.6 billion in oil and gas royalties for the same year.

Depending on overall market demand and competition from non-Federal mines, coal production from Federal and Indian leases is expected to increase from 93 million tons in 1980 to 268 million tons by 1990. The anticipated rise in production could significantly increase Federal and Indian coal royalties. Coal production of 93 million tons on Federal and Indian leases yielded royalties of $40 million; 268 million tons is expected to produce royalties of at least $115 million (assuming no increase in coal prices.)

Because the Federal government owns 60 percent of the coal reserves in Western States, those States' share of Federal coal royalties could be a significant source of income. Important Federally owned coal reserves are located in Colorado, Montana, New Mexico, North Dakota, Oklahome, Utah and Wyoming. Just how significant coal may prove to be as a source of royalty income to the States and coal owning Indian tribes depends on the future significance of coal based synfuels and coal exports.

The Commission briefly reviewed some of the problems of royalty management for solid energy minerals. From

this preliminary review, it appears that the general problems of verifying production, determining fair market value, and designing an effective audit program are common to all minerals. The Commission believes that many of the recommendations of this report, which were formulated primarily with oil and gas royalties in mind, may be applicable as well to managing royalties from the solid energy minerals.

The managers of the Federal royalty program should carefully study the solid energy minerals royalty area and assure itself that the changes being designed into the royalty management system are compatible with the solid energy minerals. The Commission saw no evidence that such an in-depth study has occurred. It should be done before the final system design is completed.

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[APPENDIX H]

RESPONSIBILITIES OF THE BUREAU OF INDIAN AFFAIRS IN THE MINERALS MANAGEMENT PROCESS

The Bureau of Indian Affairs administers the Secretary's trust responsibilities with respect to the development and production of Indian minerals held in trust or in restricted status. These responsibilities are accepted to be an obligation to protect the resources and to obtain the highest remuneration for the sale of them. Specifically, the Bureau is responsible for:

- Processing and approving all exploratory permits, in consultation with the tribe;
- Advising the tribe of tract or location nominations by industry and providing any technical assistance requested by the tribe;
- Determining and including special terms in the lease prior to advertisement, in consultation with the tribe.
- Preparing competitive advertisement after authorization by tribal resolution;
- Complying with requirements of the National Environmental Policy Act of 1969 (preparation of Environmental Assessment or Environmental Impact Statement, done in concert with tribe and the USGS);
- Advertising for sealed bids (sometimes including oral auction);
- Holding lease sale and open bids;
- Requesting assistance of the USGS in determining adequacy of high bids, as necessary;

- Presenting high bids to the tribe for acceptance or rejection;
- Receiving tribal resolution indicating acceptance or rejection of successful bidders;
- Notifying successful bidders;
- Assisting bidder in completing lease, if necessary;
- Submitting completed lease form, executed by bidder, to tribe for execution;
- After tribal execution, approving lease, (the Secretary's Authority is delegated to Bureau).
- Collecting, accounting, and distributing bonus and rental income prior to production;
- Making distribution of royalty payment after it is transmitted from USGS royalty management office, once production begins;
- Taking remedial lease compliance actions, either individually or with technical advice from USGS;
- Canceling lease, if necssary; and
- Processing final administrative termination of lease after site inspection approval by the USGS.

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